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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1104

THE HOOPA VALLEY TRIBE,
Petitioner,

v.

JESSIE SHORT, ET AL., and THE UNITED STATES,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

BRIEF AMICI CURIAE OF ASSINIBOINE AND SIOUX TRIBES OF FORT PECK INDIAN RESERVATION, MONTANA, SHOSHONE TRIBE OF WIND RIVER RESERVATION, WYOMING, AND STANDING ROCK SIOUX TRIBE OF STANDING ROCK RESERVATION, NORTH DAKOTA AND SOUTH DAKOTA

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The Assiniboine and Sioux Tribes of Indians of the Fort Peck Indian Reservation, Montana, the Shoshone Tribe of Indians of the Wind River Reservation, Wyoming, and the Standing Rock Sioux Tribe of Indians of the Standing Rock Reservation, North Dakota and South Dakota, respectfully move this Court for leave to file the accompanying brief in support of the petition of the Hoopa Valley Tribe for a writ of certiorari in the above entitled case.

We believe it essential for the Supreme Court of the United States to clarify the nature and extent of Indian tribal rights on an Indian reservation which were treated by the Court of Claims in the decision below.

Respectfully submitted,

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I. Statement of Interest

The *amici* Indian tribes named above are all American Indian tribes, recognized by the Secretary of the Interior, and possess governing bodies which, subject to Congressional control and administrative actions taken pursuant to Congressional enactment, manage their own affairs, including the determination of entitlement to enrollment

within the tribes, which enrollment carries with it the concomitant right to share in the communal assets of the tribes, any distributions thereof and the powers of self-government.

The decision of the Court below affects *amici's* powers of self-government, reaching down to the most basic level, that of entitlement to enrollment in the various *amici* tribes. *Amici*, therefore, have a direct interest in the pending case.

Your *amici* support the position of the Hoopa Tribe and urge the Court to grant their petition for a writ of certiorari and reverse the decision of the court below.

II. The Court of Claims Has In Effect Taken From Indian Tribes the Rights of Self-Government and Self-Determination

Historically, Indian tribes, subject to administrative review under Congressional enactments, determine who shall be entitled to tribal enrollment and membership in the tribal body politic, which membership includes the right to participate in governing the tribe to its destiny and sharing in the tribal assets.

The United States Government, in the instant case, has repeatedly assured the Hoopa Indians of their exclusive rights to their aboriginal homelands on the original Hoopa Valley Reservation (the Square), and has strongly encouraged them to organize a modern, efficient tribal government for purpose of administering the resources of the Square. In fact, this is precisely what the Hoopa Indians have accomplished, by establishing a freely-elected governing body with power to administer reservation affairs. The government, through the offices of the Secretary of the Interior, has consistently affirmed these actions, *i.e.*, the Secretary considered and approved

the Hoopa Constitution and By-laws, and has distributed the assets of the Square exclusively to duly enrolled members of the Hoopa Valley Tribe of Indians.

All was as it should have been until the Court of Claims adopted the trial judge's opinion in *Short*, thereby assuming for itself the role of determining an individual claimant's eligibility for enrollment in an Indian tribe. This decision, in general, destroys a substantial measure of tribal sovereignty and, in particular, threatens irrevocably to destroy the efforts of the Hoopa Indians towards self-government, self-determination and, more importantly, self-identity.

It cannot be supposed that only the Hoopa Indians will be grievously affected by the ruling of the Court below, for most Indian tribes make capital distributions of tribal assets in appropriate circumstances. Henceforth, under the precedent now established, anyone denied enrollment in a tribe with the approval of the Secretary of the Interior need merely sue in the Court of Claims to have that denial reviewed and reversed. The Court then may do as it did below, establish its own criteria of enrollment, after reviewing a century of legislative and administrative acts, and grant or deny enrollment by awarding or denying the claim. This is in clear violation of the established principle that tribal membership, for purposes of capital asset distribution, is a subject of Congressional or tribal initiative. *Stephens* v. *Cherokee Nation*, 174 U.S. 445 (1899); *Martinez* v. *Southern Ute Tribe*, 249 F.2d 915 (10th Cir. 1957).

III. Conclusion

The petition for certiorari of the Hoopa Valley Tribe should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this 14th day of February, 1974, served the attached Motion for Leave to File Brief Amici Curiae and Brief Amici Curiae on the Hoopa Valley Tribe, petitioner, by delivering three copies to its counsel of record, Jerry C. Straus, Esq., Wilkinson, Cragun & Barker, 1735 New York Avenue, N.W., Washington, D.C. 20006, on the United States, respondent, by mailing three copies, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, and on Jessie Short, et al., respondents, by mailing three copies, airmail postage prepaid, to their counsel of record, Harold C. Faulkner, Esq., and William C. Wunsch, Esq., Faulkner, McComish & Wunsch, 351 California Street, San Francisco, California 94104.

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Motion

Amicus Curiae Brief On Behalf Of The Fort Mojave Indian Tribes Of Arizona, California, Nevada, The Cortina Rancheria Of California, The Stewart's Point Rancheria (Kashia Band) Of California, The Los Coyotes Reservation Of California, The Pauma Reservation Of California, The Covelo Indian Community (Round Valley) Of California, The Colorado River Indian Tribes Of Arizona, And The California Tribal Chairmens Association

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Amici Curiae do hereby respectfully move for leave to file a brief Amicus Curiae in this case, in support of Petitioner, as provided in Rule 42 of the Rules of the Court. The consent for the attorneys for the Petitioner has been granted. The consent of the attorneys for the Respondents has not been granted.

Amici Curiae, with the exception of the California Tribal Chairmens Association are American-Indian Tribes who have been duly recognized by the Federal Government. Their reservations are located in the States of Arizona, California and Nevada. They are all Executive Order reservations. The California Tribal Chairmen's Association represents approximately 32 elected or appointed chairmen of reservations and federally-recognized Indian tribes in California.

Amici Curiae are extremely interested in doing whatever is necessary and proper to both strengthen their tribal governments and to precipitate economic development upon their reservations. In order to accomplish these objectives, it is imperative that their legal status be undisputed, thereby making it possible for them to proceed with programs for economic development which of necessity must include the exercise of governmental powers, the power to contract, to lease, to encumber, to sell, to purchase, and other economic vehicles designed to achieve economic progress. If the judgment of the Court Below is permitted to stand, it is the sincere opinion of Amici Curiae that this would constitute such a serious blow to tribal government as to destroy the economic development programs currently being pursued by them. With this in mind, Amici feel that their contribution in the form of a brief Amicus Curiae should assist this Honorable Court in its determination of the critical, legal issues presented by the case at bar.

Wherefore, it is respectfully prayed that this Motion for Leave to file the Amicus Curiae brief on behalf of Amici should be granted.

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INTEREST OF AMICI CURIAE

Amici Indian tribes are all duly recognized tribes of American Indians whose reservations are located in three States, namely: Arizona, California and Nevada. The lands comprising their reservations are valuable from an appraisal's point of view, but they cannot eat dirt, so it must be deemed virtually valueless until they are economically developed. The California Trial Chairmens Association represents reviews of the governing bodies of numerous federally recognized Indian tribes in California.

In their desire to implement economic development programs, Amici have become acutely aware of the commercial requirement that economic development of their lands makes it imperative that their governing bodies must enjoy such attributes of sovereignty as to eliminate any question regarding their capacity to perform on behalf of their respective tribes and that they possess a clear and unquestioned title to their

lands. The judgment of the Court Below clearly challenges the right of a tribe to determine its own membership by finding that Indians of another tribe, the Yuroks, are entitled to participate in the economic benefits of the development programs implemented by the Hoopa Tribe. This conclusion constitutes a challenge to tribal sovereignty, and precipitates a serious question regarding the vested interest of Indian Tribes with Executive Order reservations. Hence, since Amici desire to achieve effective economic development on their reservations, they sincerely believe that they have a vital interest in the outcome of the case at bar.

QUESTIONS PRESENTED

The questions presented by the case at bar are:

1. Is the judgment of the Court Below incompatible with the legal sovereignty of the Hoopa Tribe?

2. Does the judgment of the Court Below disregard the Doctrine of "Recognized Title"?

REASONS FOR GRANTING THE WRIT

Amici Curiae join Petitioner in asserting all of the reasons set forth in the Petition for a Writ of Certiorari. The Petition comprehensively discusses the various areas in which the Court Below erred, and states excellent reasons why this Honorable Court should review the matter. Amici desire to place special emphasis in this brief on the consequences of the decision below for Indians throughout this nation, and its negative impact on Federal Indian policy.

I.

The Judgment Of The Court Below Is Tantamount To An Interference With Tribal Sovereignty.

On July 8, 1970, the President in a Message to Congress, said:

> "The destiny of Indians and Indian communities throughout the United States is dependent upon their ability to utilize productively their remaining lands and natural resources. The federal government has acknowledged its trust responsibility to Indians, which arises out of a history of unfortunate relations between the nation and its original inhabitants. In pursuance and fulfillment of this responsibility, the government has afforded certain advantages to its Indian wards. Special treatment and programs for Indians are necessary to compensate for unconscionable dealings with the Indians in the past and to remedy the most alarming present state of abysmal poverty and despair that typifies Indian communities."

One of the primary purposes of the Bureau of Indian Affairs is to implement a federal policy to change this situation. Every year, as part of its proposed budget for the coming fiscal year, the Bureau of Indian Affairs makes the following statement to the House and Senate Appropriation Subcommittees when considering its budget request:

> "The ultimate goals of the Bureau of Indian Affairs for the Indian people are maximum eco-

> nomic self-sufficiency, equal participation in American life and equal citizenship privileges and responsibilities. The Bureau is working toward two basic programs, one of which is education, and the other is the economic development of reservation resources."

The United States recognized that the reservation system imposed severe limitations on the ability of the Indians to maintain a livelihood. Limitation of land area changed traditional patterns of living; confinement to lands which were unfertile and short of water made it difficult to eke out even a subsistence standard of living; and removal to new, often strange areas was destructive of family and community which is the basis of cultural identity and social structure.

With a gradual decline in direct subsidies and a realization that paternalism would only foster continued dependence, there has emerged a Federal policy of encouraging economic development and self-sufficiency. This policy was implemented by means of several economic programs and incentives. The future of these programs is in great doubt, however, if Indians can lose both their tribal status and property by judicial fiat.

From the earliest years of the Republic, Indian Tribes have been recognized as "distinct, independent, political communities." *Worcester v. Georgia*, 6 Pet. 515, 559 (1832). In accordance therewith they were qualified to exercise powers of self-government, not

by virtue of any delegation of powers from the Federal Government, but rather by reason of their original tribal sovereignty. Thus, treaties and statutes of Congress have been looked to by the courts as limitations upon original tribal powers, or, at most evidences of recognition of such powers rather than as the direct source of tribal powers. This is but an application of the general principle that "it is only by positive enactments, even in the case of conquered and subdued nations, that their laws are changed by the conqueror." *Wall v. Williamson*, 8 Ala. 48, 51. In fact, in 1959 the United States Supreme Court made it clear that the law had not changed on this subject when it stated that "over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of Worcester has remained." *Williams v. Lee*, 358 U.S. 217, 219.

Perhaps the most basic principle of all Indian law, supported by a host of decisions, is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express Acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian Tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the

judgment of Congress, these tribes could no longer be safely permitted to handle. Statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content.

The Acts of Congress which appear to limit the powers of Indian tribes are not to be unduly extended by doubtful inference. What was said in the case of *In re Mayfield*, 141 U.S. 107 is still pertinent:

> "The policy of Congress has evidently been to vest in the inhabitants of the Indian country such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization. We are bound to recognize and respect such policy and to construe the acts of the legislative authority in consonance therewith."

In point of form, it is immaterial whether the powers of an Indian tribe are expressed and exercised through customs handed down by word of mouth, or through written constitutions and statutes. In either case the laws of the Indian tribe owe their force to the will of the members of the tribe. The status of Indian nations or tribes, preserving their political entity under the decisions of the Supreme Court, has been summed up in Felix Cohen's "Handbook of Federal Indian Law," at 122, as follows:

> "The whole course of judicial decision and the nature of Indian tribal powers is marked by ad-

> herence to three fundamental principles: (1) An Indian tribe possesses in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to legislative powers of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government."

In *United States v. Kagama*, 118 U.S. 375, 381-82 (1886), this Court summed up the status of the Indian in the following language:

> "They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relation; not as states, not as nations, not as possessors of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, thus far not brought under the laws of the Union or of the State within the limits they reside."

The acknowledgment of tribal sovereignty or autonomy by the courts of the United States has not been a matter of lip service to a venerable but out-

moded theory. The doctrine has been followed through the most recent cases, and from time to time carried to new implications. Moreover, it has been administered by the courts in a spirit of genuine respect. In fact, the painstaking analysis by the Supreme Court of tribal laws and constitutional provisions in the Cherokee intermarriage cases, (203 U. S. 706) is typical, and exhibits a degree of respect proper to the laws of a sovereign state.

The whole course of congressional legislation with respect to the Indians has been based upon a recognition of tribal autonomy. As was said in a Report of the Senate Judiciary Committee (prior to the enactment of the United States Code, Title 18, Sec. 548); "Their right of self-government, and to administer justice among themselves, after their rude fashion, even to inflicting the death penalty, has never been questioned." (Sen. Report No. 268, 41st Congress, 3rd Session). In fact, the courts have consistently seen fit to view the status of Indian tribes and the sovereignty possessed by them as being above the sovereignty accorded states. For instance, in the case of *Native American Church v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959), the Court said:

> "But as declared in the decisions hereinbefore discussed, Indian tribes are not states. They have a status higher than that of states. They are subordinate and dependent nations possessed of all power as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States."

From the foregoing, it should be apparent that the Hoopa Tribe possesses that all-important attribute of sovereignty which includes the power to determine its own membership and the right to participate in the income derived from tribal property, and that no court should be allowed to usurp or undermine this attribute of sovereignty.

II.

The Judgment Of The Court Below Failed To Consider The Doctrine Of Recognized Title.

It is quite clear from the opinion of the Court of Claims in the case at bar that there was considerable reliance upon the case of *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949). Standing alone, this might be viewed as a sufficient foundation for the Court's opinion, but it must be respectfully noted that this would amount to a disregard of the Doctrine of "Recognized Title".

Historically, title in land has been granted to Indian tribes through treaties, trust patents, and by purchase. See Federal Indian Law, 1958 ed. at 592-613. The lands in question were established by Executive Order. Amici concede that Executive Orders, *per se*, do not have the effect of conveying title to tribes. The historical effect of Executive Orders regarding the Indians' legal rights is summed up in Federal Indian Law, *supra*, at 620:

> "Comparatively few questions have arisen as to the interpretation of Executive Orders establish-

> ing Indian reservations. One such question was raised before the Court of Claims in the Case of Crow Nation v. United States (cites). According to that court, the phrase in controversy reserving an area for the Crow Tribe 'and such other Indians as the President may, from time to time, locate thereon' gave the Crow Tribe . . . 'only the right to reside upon the reservation, so set apart by Executive Order, and did not confer upon them any definite title or particular interest in the land. It was in the nature of a tenancy by sufferance or residential title' ". (p. 278 of case).

Recently, however, the United States Supreme Court has reappraised the legal effect of the Executive Order Reservation and has pointed out that Congress and the Executive branch of the government have recognized certain lands as reservation lands, and that the classification of "tenants at sufferance" no longer applies. In deciding that navigable waters could be reserved for Indian Reservations by Executive Order, the Court said:

> "Arizona also argues that, in any event, water rights cannot be reserved by Executive Order. Some of the reservations of Indian lands here involved were made almost 100 years ago, and all of them were made over 45 years ago . . . Congress and the Executive have ever since recognized these as Indian Reservations. Numerous appropriations, including appropriations for irrigation projects, have been made by Congress. They have been uniformly and universally treated as

> reservations by map makers, surveyors, and the public. We can give but short shrift at this date to the argument that the reservations either of land or water are invalid because they were originally set apart by the Executive." *Arizona v. California*, 373 U.S. 546, 598 (1963).

The evidence entitled to judicial notice by this Honorable Court graphically demonstrates that the Hoopa Tribe has received both Congressional and Executive recognition of their reservation. Furthermore, this conclusion was amplified by the members of the Hoopa Tribe who by reason thereof agreed to take small allotments so that the large timberland that remained could be administered by their tribal government for their economic benefit. Magnification of this recognition by the Executive branch of the government cannot be denied when one deliberates upon the representations of the Federal Government's agents who informed the Hoopa Tribal Government that the timberland in question belonged to their tribe, and that the income therefrom would be divided among their members. Any other conclusion would result in such severe and detrimental reliance that it cannot in the name of justice be tolerated. In other words, the Court of Claims certainly should have employed the Doctrine of "Recognized Title" thereby clearly avoiding such an unjust result.

CONCLUSION

Certiorari should, therefore, be granted in this case for all of the reasons set forth in this brief, Amici do hereby urge this Honorable Court to grant certiorari so that this vitally important case may be decided upon its merits.

Respectfully submitted,

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Counsel for Amici Curiae

SUPREME COURT, U. S.

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AND

STATEMENT OF QUINAULT TRIBE OF INDIANS OF THE QUINAULT RESERVATION, IN SUPPORT OF PETITION OF HOOPA VALLEY TRIBE OF INDIANS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The Quinault Tribe of Indians of the Quinault Reservation, Washington, moves for leave to file the attached statement, as *amicus curiae*, in support of the petition of the Hoopa Valley Tribe of Indians for a writ of certiorari to review the decision of the United States Court of Claims in *Short v. United States*, No. 102-63 (Oct. 17, 1973).

The decision of the Court of Claims below threatens the rights of members of the Quinault Tribe in the property of

their Indian reservation and threatens to extinguish the Tribe's power over tribal enrollment on the reservation.

I.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Quinault Tribe of Indians is an organized, self-governing Indian tribe located on the Quinault Reservation in the State of Washington. The Quinault Tribe feels that the orderly administration of Indian policy will be seriously disrupted by the Court of Claims decision in *Short v. United States*, No. 102-63 (Oct. 17, 1973), and to the extent that the decision diminishes the nature of Indian title, and to the extent that the decision removes from the Tribe its proper function of determining tribal enrollment for purposes of substantive rights, the Quinault Tribe will suffer immediate and possibly irreparable harm. Therefore, the Quinault Tribe supports the petition of the Hoopa Valley Tribe of Indians for a writ of certiorari.

1. The decision of the United States Court of Claims, in *Short v. United States*, No. 102-63 (Oct. 17, 1973), has profound implications for all Indian tribes in the United States. The holding of the Court of Claims will have the effect of forcing the Hoopa Indians, over their own objections and those of the United States, to surrender control over their reservation to a foreign group of Indians. The Court of Claims, by its decision, has shifted ownership of a reservation, gained by the Hoopas by an "Executive Treaty" and confirmed by course of conduct, from the Hoopas to a larger group of which the Hoopas are a minority. If the decision in *Short* is allowed to stand the economic and political future of the Hoopa Valley Reservation, and thus the Hoopa Indians, will be in the hands of

the new Yurok majority. *Amicus* submits that the future of a reservation and culture of a distinct, federally recognized Indian tribe should not be determined without consideration by the highest judicial tribunal of the land.

2. In order to execute its judgment in *Short*, the Court of Claims must consider the claims of thousands of individual Yurok Indians for entitlement to a proportionate share of the resources of the Square portion of the Hoopa Valley Reservation. In other words, the court below must now enumerate the individual members of the Hoopa Valley Reservation who are entitled to share in the distribution of the Square's resources. The determination of tribal membership is not properly within the jurisdiction of the Court of Claims. Such power has been held to reside in the Indian tribe, subject to the approval of the Secretary of the Interior or, alternatively with Congress. *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899); *Martinez v. Southern Ute Tribe*, 249 F.2d 915 (10th Cir. 1957). Nor can it be said that this function has been waived by the Tribe or the Secretary. On the contrary, the Tribe, with the encouragement and approval of the Secretary, has organized a tribal government and compiled a comprehensive tribal roll. The Solicitor's Office ruled, in 1958, that the Hoopa Valley Tribe of Indians was entitled to exclusive distribution of the resources of the Square, and that the Yurok Indians were not so entitled. *Rights of Indians in the Hoopa Valley Reservation, California*, 65 I.D. 59 (1958). The Court of Claims' decision to the contrary is an encroachment upon the sovereignty of the Tribe and upon the prerogatives of the Executive Branch.

II.

CONCLUSION

The petition of the Hoopa Valley Tribe of Indians for a writ of certiorari to the United States Court of Claims.

Respectfully submitted,

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